No. [redacted] 191

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SUPREME COURT, U. S.

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FILED
JUN 3 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C.

FRANK and LUCILLE RISTUCCIA
Appellants

vs.

EARL and BERNICE ADAMS, et al
Appellees

APPEAL FROM U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
HON. STANLEY BARNES, JUDGE
HON. WALTER ELY, JUDGE
HON. SHIRLEY HUFSTEDLER, JUDGE

APPELLANTS' JURISDICTIONAL STATEMENT

FRANK RISTUCCIA
LUCILLE RISTUCCIA
1216 N. La Brea Avenue
Hollywood, Calif. 90038

Appellants in propria personna

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IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C.

FRANK and LUCILLE RISTUCCIA
Appellants

vs.

EARL and BERNICE ADAMS
Appellees

APPELLANTS' JURISDICTIONAL STATEMENT

I

DECISIONS OF COURTS IN THIS ACTION

This case originated in the California Superior Court with "Findings" and "Judgment filed on Sept. 11, 1963. (See exhibits 3 and 4)

On Oct. 2, 1964 the Calif. Superior Crt entered an "Order" denying the appellants' "Motion To Open Judgment To Modify Costs and Damages". (See Exhibit 6 in appendix)

Appeals to the Calif. District Crt of

Appeal, the Calif. Supreme Crt, the U.S. District Crt and the U.S. Circuit Crt of Appeals were all denied on Jan. 26, 1967, March 22, 1967, April 26, 1967, and Feb. 12, 1969 respectively. (See exhibits 7, 8, 9, 10 in appendix.)

II

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The appellants invoke the jurisdiction of the U.S. Supreme Crt on the following grounds:

1. That they were denied a fair trial, due process and equal protection of the law in violation of the U.S Constitution in the Calif. Superior Crt and courts on appeal in the determination and award of costs and damages.

2. That they exhausted all legal remedies open to them in the lower courts after proper and timely applications were made.

3. That they are entitled to the relief they seeking.

4. That the face of the record in this case and the law clearly show that the judgment of the trial crt regarding costs and damages and the decisions of the various courts on appeal are all void and cannot be the basis of any right or claim and must be corrected to conform to the law.

5. That they filed on March 14, 1969, in the U.S. Crt of Appeals a proper and timely appeal to this court.

III

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

1. Whether the appellants as prevailing defendants in the Calif. Superior Crt are entitled to all necessary costs of suit including attorney and expert witness fees.

Whether the appellants received a fair trial on the merits in the Calif.

Superior Court in the determination of costs.

Whether the Court Commissioner in this case had the authority to render a valid decision of costs based upon a stipulation of attorneys.

Whether the appellants' attorney in this case committed fraud against them when he entered into a stipulation with the opposing side with the willful intent and purpose of preventing a trial on the merits in the determination of costs and with the willful intent and purpose of reducing the appellants' costs from $1861 to $104.90 without the appellants knowledge or consent.

Whether the judgment of the Calif. Superior Crt regarding costs is void for lack of jurisdiction and fraud and whether such a judgment can be the basis of any right.

2. Whether the Calif. Superior Crt had jurisdiction of the subject matter of the appellants' cross-complaint concerning title and possession of real property.

Whether the appellants received a fair trial on the merits in the determination of damages on their cross-complaint concerning title and possession of real property.

Whether an award of $25 as damages on the appellants' cross-complaint is adequate for an encroachment on their real property.

Whether the decision of the Calif. Superior Court regarding damages on the appellants' cross-complaint concerning title and possession of real property is void for lack of jurisdiction and whether it can be the basis of any right.

3. Whether the appellants "Motion to Open Judgment to Modify Costs and Damages"

in the Calif. Superior Crt under CCP 473 was a proper, timely and authorized procedure to gain relief from a void judgment due to lack of jurisdiction and fraud and whether the denial of the motion by the Court was void.

4. Whether the appellants' case is final or whether it is still pending.

5. Whether the Calif. District Court of Appeal rendered a void decision when it denied the appellants' appeal and imposed a penalty of $200 against them, calling their appeal frivolous.

6. Whether the Calif. Supreme Court rendered a void decision when it denied the appellants' appeal without a hearing and without keeping a docket of the case.

7. Whether the appellants were entitled to a removal of their case on appeal from the Calif. Supreme Crt to the U.S. District Court based upon 28 U.S.C sections

1441 and 1443.

Whether the appellants' appeal to the U.S. District Court was timely.

Whether the civil rights statutes 1441 and 1443 of 28 U.S.C. can only be invoked for a federal forum in civil rights cases which involve racial equality or wether they can also be invoked in civil rights cases which involve a denial of a fair trial, due process or equal protection of the law under the U.S. Constitution.

Whether the U.S. District Court rendered a void decision when it denied the appellants' "Petition For Removal" and remanded the case to the Calif. Superior Crt without a hearing.

7. Whether the U.S. Crt of Appeals rendered a void decision when it dismissed the appellants' "Complaint For Declaratory Relief and Injunction" without any findings or conclusions of the issues pre-

sented for consideration.

8. Whether a void decision of a court can be the basis of any right and whether it can remain uncorrected after proper and timely application is made for relief.

IV

STATEMENT OF THE CASE

This case originated in the Calif. Superior Crt where the Appellants were prevailing defendants and were also prevailing cross-complainants concerning title and possession of real property.

On Sept. 11, 1963 the appellants were awarded judgment on the complaint without an entry of costs and were awarded judgment on their cross-complaint in the sum of $25. (Exhibit 3 and 4 in appendix).

Costs were unlawfully determined and entered on Sept. 24, 1963 by a Court Commissioner of the Calif. Superior Crt, based upon a fraudulent stipulation of attorneys filed

on Aug. 20, 1963 which reduced the appellants' costs from $1861 as claimed in their "Memorandum of Costs" filed on Sept. 12, 1963, to $104.90. (See exhibits 2 and 5 in appendix)

Because the appellants believed they were awarded inadequate costs and damages by the Calif. Superior Crt, without a trial on the merits and contrary to the law and in violation of their guaranteed rights under the U. S. Constitution, they filed on Sept. 14, 1964 a "Motion To Open the Judgment To Modify Costs and Damages" based on the Calif. Code of Civ. Proc. section 473 on the grounds that the judgment regarding costs and damages was void for lack of jurisdiction and fraud.

On Oct. 2, 1964 the Court entered an "Order" denying the "Motion" on the grounds that the judgment was final. (See exhibits 1, 2, 3, 4, 5, and 6 in appendix)

From the motion a timely appeal was filed to the Calif. District Court of Appeal and thereafter to the Calif. Supreme Court, the U.S. District Court and the U.S. Circuit Court of Appeals.

All appeals were denied and the Calif. Supreme Court and the U.S. District Court denied the appeals without allowing a hearing.

V

GROUNDS FOR FEDERAL CONSIDERATION

The grounds for federal consideration are as follows:

1. The lower courts have erroneously and consistently refused to give the appellants relief from the clearly void judgment of costs and damages of the Calif. Superior Court even though proper and timely applications were made for relief and even though supporting proof was clearly visible on the face of the record and the

supporting law and the lower courts have erroneously concluded that such a judgment is not void and that the appellants received all costs and damages to which they are entitled even though the face of record and supporting law clearly prove that the judgment of costs and damages is void and that the appellants did not receive adequate costs and damages.

2. Lower courts have erroneously concluded that the judgment of costs and damages is final and that the case is not pending even though the face of the record and supporting law proves that the judgment of costs and damages is not final and will continue to be pending until corrected and proper relief is given.

3. Lower courts have erroneously concluded that there was a trial on the merits in the procurement of costs and damages even though the face of the record and support-

ing law clearly show that there was no trial on the merits.

4. The lower courts have erroneously concluded that the appellants "Motion to Open Judgment to Modify Costs and Damages" under Calif. Code of Civ. Proc. section 473 is not a timely, proper, applicable or authorized procedure for relief from a void judgment of costs and damages and that such a motion must be taken within 6 months after judgment is rendered even though the face of the record and t. supporting law show that the appellants' motion was entirely timely, proper, applicable and authorized.

5. The lower courts have erroneously concluded that there was no fraud committed in the procurement of costs by the appellants' attorney even though the face of the record and supporting law conclusively prove that there was fraud committed which was dir-

costly responsible for insufficient costs and damages being awarded.

8. The lower federal courts have erroneously concluded that the appellants in this case were not entitled to remove their action to federal courts based upon civil rights statutes 1441 or 1443 of 28 U.S.C. even though the face of the record and supporting law and common sense indicates that the appellants were entitled to do so.

9. The lower courts have erroneously and unjustly concluded that the appellants' appeals were frivolous, without merit and without honest purpose even though the face of the record clearly shows that the appeals were not frivolous, that they had merit, were taken for honest purposes and should be given proper consideration.

8. If this court does not correct the void judgment of costs and damages of the

APPENDIX

	Exhibit
"Cross-Complaint" Calif. Superior Court	1
"Stipulation" Calif. Superior Court	2
"Findings and Conclusions" Calif. Superior Court	3
"Judgment" Calif. Superior Court	4
"Memorandum of Costs" Calif. Superior Court	5
"Order Denying Motion" Calif. Superior Court	6
"Decision" Calif. District Crt of Appeal	7
"Decision" Calif. Supreme Court	8
"Decision" U.S. District Court	9
"Decision" U.S. Circuit Crt of Appeals	10

Phillip M. Rohlin
Attorney at Law
1333 N. Stanley Avenue, Suite Six
Los Angeles 46, California

Attorney for Defendants FRANK R. RISTUCCIA and LUCILLE RISTUCCIA

FILED
NOV 13 1962
FOR [illegible] COUNTY CLERK
R. E. WILLIAMS, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EARL ADAMS and BERNICE ADAMS, Plaintiffs and Cross Defendants, and Does I through XX, Cross Defendants vs. FRANK R. RISTUCCIA and LUCILLE RISTUCCIA, Defendants and Cross Complainants.	No. 805962 CROSS COMPLAINT FOR INJUNCTION AND DAMAGES FOR ABATEMENT OF A CONTINUING TRESPASS

Comes now cross complainants FRANK R. RISTUCCIA and LUCILLE RISTUCCIA, and for a cause of action against the defendants, and each of them, complain and allege as follows:

I

That the true names or capacities, whether individual, corporate, associate, or otherwise of defendants I through XX are unknown to cross complainants who, therefore, sue said defendants by such fictitious names and will ask leave of court to amend their complaint to show their true names and capacities when the same have been ascertained.

II

That during all the times herein mentioned, and prior to the commencement of this action, cross defendants EARL and BERNICE ADAMS have been and now are owners in fee and in possession of all that certain real estate situated at 1212 North La Brea Avenue, situated in the city of Los Angeles, County of Los Angeles, State of California.

III

That cross complainants are the owners of the lot adjoining

EXHIBIT 1

that of cross defendants, and their lot is located at 1216 North La Brea Avenue, situated in the city of Los Angeles, County of Los Angeles, State of California.

IV

That on or about October 2, 1963 cross defendants erected a large building on said lot located at 1212 North La Brea Avenue, and a portion of that building is on cross complainant's lot.

V

That cross defendants, and each of them, intentionally and maliciously erected said building so that part of it would encroach on cross complainants' lot.

VI

That prior to the commencement of this action cross complainants demanded of cross defendants, and each of them, that cross defendants remove that part of their building which encroaches on cross complainants' land but cross defendants have neglected and refused, and still neglect and refuse to remove said portion of their building which encroaches.

VII

That cross complainants will suffer great and irreparable injury if said building erected by cross defendants is allowed to remain on cross complainants' land .

VIII

Cross complainants have no plain, speedy or adequate remedy at law.

WHEREFORE, cross complainants pray for judgment against cross defendants, and each of them, as follows:

1. That cross defendants, and each of them, be ordered to remove that portion of said building which encroaches upon cross complainants' land;

2. For general damages in the sum of $22,750.00;

3. For exemplary and punitive damages in the amount of $75,000.00.

DATED: November 9, 1962

P. Phillip Rohlin

PHILLIP N. ROHLIN
Attorney for cross complainants

HECKER, DUNFORD & KENEALY
& CHARLES A. PRICE
ATTORNEYS AT LAW
[illegible]
LOS ANGELES 5, CALIFORNIA
[illegible]

Plaintiffs and
Attorney for Cross-Defendants

FILED
AUG 20 1963
WILLIAM G. SHARP, County Clerk
By L. Robinson
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EARL ADAMS and BERNICE ADAMS, Plaintiffs and Cross-Defendants, v. FRANK R. RISTUCCIA, LUCILLE RISTUCCIA, DOES I through XX, Inclusive, Defendants and Cross-Complainants.	No. 805,962 STIPULATION RE: COSTS

IT IS HEREBY STIPULATED by and between the parties to this action, through their respective attorneys, that the Memorandum of Costs, dated July 30, 1963 shall be amended so as to strike therefrom all items except items 1, 12, 13, 14, 20, 21, 22, 23 and 28, and that the total costs recoverable by defendants and cross-complainants in the above-entitled case shall be the sum of $104.90.

Dated: August 19, 1963.

HECKER, DUNFORD & KENEALY
and CHARLES A. PRICE

by _____
CHARLES A. PRICE
Attorneys for Plaintiffs
& Cross-Defendants

DONALD T. STERLING

by _____
HAROLD GAMER
Attorneys for Defendants
& Cross-Defendants

SEP 24 1963

Clerk is directed to enter costs in total sum of $104.90.

OSTRIN
Court Commissioner
Los Angeles County

SEP 24 1963

EXHIBIT 2

LAW OFFICES OF
DONALD T. STERLING
SUITE 930 WILSHIRE-BEVERLY CENTER
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA
CRestview 8-8080
BRadshaw 8-8080

Attorney for: Plaintiffs and Cross-Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN THE COUNTY OF LOS ANGELES

EARL and BERNICE ADAMS, Plaintiffs and Cross-Defendants, vs. FRANK and LUCILLE CRISTUCCIA, JOE ONE through JOE TWENTY, inclusive, Defendants and Cross-Complainants.	No. [illegible] FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the [illegible] day of [illegible], 1962, in department 84 of the above entitled court, before the HONORABLE [illegible], judge presiding, sitting without a jury, a jury having been duly waived. CHARLES PRICE appearing as attorney for plaintiffs and cross-defendants, and DONALD T. STERLING by HAROLD G. [illegible] appearing as attorney for defendants and cross-complainants, and the cause having been duly called, the fictitious names of defendants sued, and oral and documentary evidence introduced on behalf of both parties, and the court having considered the same and heard the arguments of counsel and being fully advised in the premises, now makes its findings of fact on the merits:

I

The allegations contained in paragraph [illegible] of the cross-complaint are true.

II

EXHIBIT 3 -

ENTERED
WILLIAM S. SHARP
COUNTY CLERK

Sep 12 61

LAW OFFICES OF
DONALD T. STERLING

BOOK PAGE
4850 043

FILED
SEP 11 1961
WILLIAM S. SHARP, County Clerk
By [illegible] Deputy

Attorneys for Plaintiffs and Cross Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BERNICE ADAMS,

Plaintiffs and
Cross Defendants

vs.

No. 805 952

JUDGMENT

and LUCILLE BISTUCCIA
[illegible] through INCLUSIVE,

Defendants and
Cross Complainants

That the above entitled cause came on regularly for trial on [illegible], in Department 82 of the above entitled court before the HONORABLE MARSHALL A. [illegible] judge presiding, sitting without a jury, a jury trial having been expressly waived, CHARLES PRICE, appearing as attorney for [illegible] and HAROLD GAMSON appearing as attorney for defendant, and cross-complainants, evidence both oral and documentary having been introduced and the cause submitted for decision, and the court having heretofore made and caused to be filed its written findings of fact and conclusions of law

IT IS ORDERED, ADJUDGED AND DECREED that the court [illegible] judgment on the merits in the defendant on the complaint, and further [illegible] judgment on the merits in the cross complainants on the cross complaint, the amount of [illegible] Five Dollars ($25.00), together with costs [illegible] and attorneys fees amounting to [illegible]

DATED Sept 11, 1963

Honorable Martin Katz
Judge in the Superior Court

ENTERED SEP 21 1963

BOOK 4850 PAGE 43

BY Q. J. Blaisdell DEPUTY

DONALD T. STERLING

ATTORNEY FOR Defendants Cross-Complainants

ADDRESS 9465 Wilshire Boulevard

Beverly Hills, California

TELEPHONE CRestview 3-2050

FILED

SEP 12 1963

WILLIAM A. SHARP, County Clerk

By Helen Bennett DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

EARL and BERNICE ADAMS, Plaintiffs-Cross-Defendants

vs.

FRANK and LUCILLE RISTUCCIA, Defendants-Cross-Complainants

No. 805 962

MEMORANDUM OF COSTS AND DISBURSEMENTS

CLAIMED BY Defendant Cross-Complainants

Sheriff's fees							$
1—Clerk's fees							$12.50
2—Reporter's fees Dates:					days at $		$
NOTARY FEES Name of Notary			Name of Document				
3					fee claimed $		
4					fee claimed $		
5					fee claimed $		
6					fee claimed $		
7					fee claimed $		
8					fee claimed $		
9					fee claimed $		
10					fee claimed $		
11 JURY FEES Dates					days at $		$
Jury mileage estimated by Clerk							$
WITNESS FEES AND MILEAGE Witness	Dates in Court	Fees	Miles Traveled (One way only)			Place from which claimed	
12 Charles Stickney		$ 4.00	10	at 35 ¢	$3.50	1725 Silver Lake Blvd., L. A.	$ 7.50
13 T. S. Taft		$ 4.00	12	at 35 ¢	$4.20	1789 Sunset Blvd.	$ 8.20
14 Nick Briglio		$ 4.00	11	at 35 ¢	$3.85	Fountain and La Brea, L. A.	$ 7.85
15		$		at ¢	$		$
16		$		at ¢	$		$
17		$		at ¢	$		$
18		$		at ¢	$		$
19		$		at ¢	$		$

SERVING PROCESS Served by	Persons Served	Process Served	Fees	Miles (One way)	Mileage
20 AAA Att. Service	Charles Stickney	7/8/63	$1.00	10 @ 35 ¢	$3.50 $ 4.50
21 "	T. S. Taft	"	$1.00	12 @ 35 ¢	$4.20 $ 5.20
22 "	Nick Briglio	"	$1.00	11 @ 35 ¢	$3.85 $ 4.85
23 Said parties were served for this action April 24 to April 30, 1963, originally					$
24 set for May 11, 1963 - Costs at that time were			$	@ ¢	$ 14.55
25			$	@ ¢	$

(OVER)

MEMORANDUM OF COSTS AND DISBURSEMENTS

EXHIBIT 5

[illegible]	[illegible]	[illegible]
Engineering fee for T. R. D. surveyor for investigation #7	for half day in	$ 191.00
Kenwick & Associates checked surveyor's plan		$ 32.00
Transcripts of defendants' depositions		$ 35.75
Registered Letters		$ 1.82
Witness by Charles Stickney, Esq. $35.00 and half day in Court $75.00		$ 110.00
Xerox photo copies of release $3.30 and Films $3.00		$ 6.30
Witness Phil Rohlin $60.00 Minnick Grotler D'Angelo		$ 125.00
Witness Harold Gamer		$ 104.00
	TOTAL	$ [illegible]

COSTS TAXED BY ORDER OF COURT $ [illegible]

STATE OF CALIFORNIA
County of Los Angeles } ss

HAROLD GAMER

being first duly sworn says

That affiant is the plaintiff in the above entitled action; that he has read the foregoing bill of costs and knows the contents thereof and as such are true to affiant's own knowledge except as to those matters which are therein stated upon information and belief, and as to those matters affiant believes it to be true; that the disbursements mentioned therein, to the best of my knowledge and belief are true; that the items in said bill of costs are correctly stated; that said disbursements have been actually and necessarily made and incurred in this action or proceeding; and that said costs and disbursements have been necessarily

Dated July 10, 19[illegible]

I declare (or certify) under penalty of perjury that the foregoing is true and correct.

Signature

Harold Gamer
Signature

Subscribed and sworn to before me this [illegible] day of [illegible], 19[illegible]

Notary Public in and for said County and State

My commission expires [illegible]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT.

Date: Sept 24, 1964

HONORABLE Leon T David JUDGE K V Baird DEPUTY CLERK 66

HONORABLE JUDGE PRO TEM

Deputy Sheriff Reporter

(Parties and counsel checked if present)

6

805962

Earl Adams, et al
vs
Frank R Ristuccia, et al

Counsel for Plaintiff: Charles A Price

Counsel for Defendant: Frank Ristuccia, in pro per
Lucille Ristuccia, in pro per

Statistical Code Clerks Use Only	1	2	3	4	5	6	7	8	9	10	11	AT 12	13	14	15	16
	7635	79	00	00	69	1	000	00	000	000	00	15	00	10		

NATURE OF PROCEEDINGS.

Motion of defendants and cross-complainants Frank R Ristuccia and Lucille Ristuccia for orders:

(1) to open Judgment

(2) to modify the amount of costs

(3) to modify the amount of damages on the Cross-Complaint

(4) and to set aside "Order to Deposit Costs"

Motion denied.
Judgment is final.

This minute order was entered
OCT 2 1964
WILLIAM C. SHARP, COUNTY CLERK and Clerk of the Superior Court
BY M. DURAN

Date: Sept 24, 1964(6) Dept. 66

78C78 10/63

EXHIBIT 6

A majority of the signers of the following opinion certify that it does not meet the standard for official publication under Rule 976.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FILED
MAR 28 1967
WILLIAM G. SHARP, County Clerk
C. Krongold
BY C. KRONGOLD, DEPUTY

803 9/67

EARL ADAMS and BERNICE ADAMS,

Plaintiffs and Respondents,

vs.

FRANK R. RISTUCCIA and LUCILLE RISTUCCIA,

Defendants and Appellants.

2nd Civil No. 29018

COURT OF APPEAL-SECOND DIST
FILED
JAN 26 1967
CLAY [illegible], JR. Clerk
[illegible] Clerk

Appeal from order of the Superior Court of Los Angeles County. Leon T. David, Judge. Affirmed.

For Appellants: Frank R. Ristuccia and Lucille Ristuccia, in propria persona.

For Respondents: Charles A. Price.

This is an appeal by Ristuccia and wife from an order denying their motion to vacate a judgment in their favor on their cross-complaint and to enter a new and different judgment. We have concluded that the motion was not made in

compliance with any authorized procedure, that the order was a proper one and that it must be affirmed.

Although the pleadings are not contained in the record on appeal we are informed by the briefs and also by the record, that the action was by Adams and wife against Ristuccia and wife for damages in the amount of $50,000; the defendants answered and filed a cross-complaint for damages in the amount of $97,750.

September 11, 1963, judgment was rendered in favor of Ristuccia and wife on their cross-complaint for $25 and costs. The judgment was entered September 12, 1963. The cross-complainants, through their counsel, filed a memorandum of costs claiming $1,833.51. Adams moved to tax costs. The attorneys for all parties entered into a written stipulation by which it was agreed that the costs of the Ristuccias were fixed at $104.90, and that amount was duly entered as a part of the judgment. Adams obtained an order of court for deposit of $129.90 in satisfaction of the judgment and the amount was deposited with the clerk of the court.

September 30, 1963, appellants were substituted in the place and stead of their attorney. No further proceedings were had until September 14, 1964, when appellants gave notice of a motion "to open the judgment; to modify the amount of costs, to modify the amount of damages on the cross-complaint, and to set aside 'Order to Deposit Costs' in the above entitled

action." The notice read: "This motion shall be made on the grounds that said judgment; regarding these costs, damages on the cross-complaint, and 'Order to Deposit Costs' is void and contrary to law, for clerical errors, lack of jurisdiction on the subject matter and because it was obtained by fraud and deceit, and will be based on the provisions of the California [C]ode of Civil Procedure, sections 473, 664, 666, 1032, 1033 and the California Civil Code, section[s] 1712, 3412, 3414; this notice, the attached Affidavit of Frank and Lucille Ristuccia, the attached Memorandum of Points and Authorities, all papers, records and documents filed therein, and upon evidence, oral and documentary to be presented at the hearing of the motion." The affidavit of the Ristuccias accused their attorney of fraud and of entering into the stipulation for costs in collusion with the Adames and their attorney, all without the knowledge and against the wishes of the Ristuccias. It was claimed by appellants that they should have had judgment on the cross-complaint for $47,750, this being the amount of the excess of their demand over the demand of the plaintiffs, and also their claimed "corrected total" costs of $1,874.11; the judgment and all actions and proceedings subsequent thereto were characterized in the affidavit as null and void, and are so referred to in the brief of appellants.

It is not surprising that when appellants discharged their attorney and took matters into their own hands they proceeded to display their incapacity to represent themselves.

They set about to obtain a new judgment for a greater amount as damages and costs. They did not appeal from the judgment. They attempted to proceed under section 473, Code of Civil Procedure, which reads in pertinent part, "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." The motion for relief must be made within six months.

The section was inapplicable to the nature of the relief sought by appellants and their motion was not timely. They had been awarded judgment for all the damages they had proved to the satisfaction of the trial court and their costs in accordance with the judgment; no judgment had been given against them on the complaint. They undertook to obtain a redetermination or a new trial of the factual issues in the case by means of their motion.

The procedure for a retrial of factual issues is by motion for a new trial (§§ 656 to 663.2, Code Civ. Proc.) There was no motion for a new trial.

Appellants assert that the court had the power to vacate proceedings that were void or which were the consequence of fraud practiced upon the court. It clearly appears that the judgment was not void and that no fraud on the court was committed.

Appellants accused all the attorneys and the plaintiffs

of fraud and conspiracy in making the agreement which they claim deprived them of some of their allowable costs. The accusation is false. An inspection of the cost bill which is in the record discloses that appellants were allowed all the costs to which they were legally entitled. Among the items disallowed pursuant to the stipulation were claims for attorney's fees of $1,464 and claims for the services of surveyors and engineers, for registered letters and photographs. None of these services or expenditures was ordered by the court. The attorney's fees were not chargeable to plaintiffs in this action and cross-action for damages. (§ 1021, Code of Civ. Proc.) Nor were the plaintiffs and cross-defendants chargeable with the amounts paid for surveying and engineering services or other services paid by appellants in the preparation of their evidence. (Crabtree v. Houghton, 191 Cal. 33.)

Respondents contend that the appeal is from the judgment and that it should be dismissed as untimely. The appeal is only from the order and was taken in time.

The Ristuccias have continued this litigation in a manner which no responsible attorney would have recommended. They sought to revive it after a year's delay. They have unjustly accused the attorneys of fraud, deceit and collusion and have asserted other preposterous claims. We deem it to be the duty of the court to discourage appeals which are obviously without merit and taken for the purpose of harrassment; such

appeals are an imposition upon adversay parties and a waste of the time and labors of the court, which belong to litigants who in good faith and with honest purposes seek its assistance. The appeal is frivolous.

The order is affirmed. Appellants are ordered to pay $200.00 as damages for a frivolous appeal, as additional costs of appeal.

SHINN, J. *

We concur.

FORD, P. J.

MOSS, J.

CLAY ROLLINS, JR., Clerk of the Court of Appeal, Fourth Appellate District, State of [illegible], do hereby certify the preceding is a true [illegible], as shown by the records of my office.

CLAY ROLLINS, JR., Clerk

By [signature] Deputy

* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

ORDER DENYING HEARING

AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

2nd District, Division 3, Civil No. 29018

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ADAMS ET AL

v

RISTUCCIA ET AL.

FILED
MAR 22, 1967
WILLIAM I. SULLIVAN, Clerk
BY _____ Deputy

Appellants' petition for hearing DENIED.

~~of the opinion that the petition should be granted~~

TRAYNOR
Chief Justice

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 30th day of March A.D. 1967

WILLIAM I. SULLIVAN

By _____
Deputy Clerk

FILED

APR 28 1967

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

ENTERED

APR 28 1967

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EARL and BERNICE ADAMS,

Plaintiffs,

vs.

FRANK and LUCILLE RISTUCCIA,

Defendants.

CIVIL NO. 67-581-S

ORDER OF REMAND

This is a petition for removal of a state court action entitled Adams vs. Ristuccia, No. 805,962, to the United States District Court. The petitioners, proceeding in pro per, are Frank and Lucille Ristuccia, defendants in the state court action.

The petition and the copies of the process, pleadings and orders served upon petitioners in the state court action disclose the following:

On or about October 15, 1962, Earl and Bernice Adams commenced an action in trespass and nuisance against the Ristuccias in the Superior Court of the State of California for the County of Los Angeles. The Ristuccias answered and counterclaimed for damages. On September 11, 1963, the Superior Court rendered judgment against plaintiffs and in favor of the Ristuccias on their counterclaim in the sum of $25.00 and costs. The attorneys for the parties

stipulated that the Ristuccias' costs were $104.90, and that amount was entered as part of the judgment. The Adamses deposited $129.90 in satisfaction of judgment with the Clerk of the Superior Court. No appeal from this judgment was taken within the time allowed.

On September 14, 1964, approximately one year after entry of judgment, the Ristuccias, acting in propria persona, filed a motion "to open the judgment; to modify the amount of costs; to modify the amount of damages on the cross-complaint, and to set aside 'Order to Deposit Costs' in the above entitled action." They claimed, inter alia, that fraud and collusion upon the part of their attorneys and the opposing parties rendered the proceedings subsequent to judgment void and that they were entitled to an award in damages and costs which greatly exceeded that amount awarded by the Superior Court.

On October 2, 1964, the Superior Court entered a minute order denying the motion. The Ristuccias appealed the denial of the motion. The Court of Appeal affirmed, and ordered the Ristuccias to pay $200.00 as damages for a frivolous appeal in addition to the costs of appeal. The Ristuccias then petitioned to the California Supreme Court for a hearing. On March 22, 1967, the petition was denied. The petition for removal was filed on April 21, 1967.

In their petition the Ristuccias claim to be entitled to removal purusant to 28 U.S.C. §§ 1441 and 1443. As grounds for removal, they state that "the record clearly shows on its face that the Superior Court's judgment regarding costs and damages is void for lack of jurisdiction and fraud and can not be the basis of any right what so ever. Under Federal and State law it is the mandatory

duty of a competent court to correct a void judgment which is brought to it's [sic] attention by application by an injured party and when the court refuses to provide such relief it has abused its discretion and has exceeded its authority. The State Courts have refused to provide to the defendants this relief and have denied them due process of law and equal protection under the U. S. Constitution, causing them irreparable harm and injury, faced with multiple lawsuits and without a plain speedy remedy under the law. The defendants now make the same application to the Federal Courts for the same relief."

It is clear that this case was not properly removed to the Federal Court. First, there is no action pending in the State Court subject to removal. Second, there is no ground for removal jurisdiction stated in the petition. Third, the petition is untimely.

There was a judgment on the merits in the state action in September, 1963. It became a final judgment after the time for appeal expired. The action against the Ristuccias and their cross-action were merged into the judgment. An obvious prerequisite for removability under both 28 U.S.C. § 1441 and 28 U.S.C. § 1443 is that there be an action pending in the State Court. The action has been adjudicated on the merits and is no longer pending.

It is equally clear that the Ristuccias's motion "to open judgment" is neither a pending action nor properly removable. Like the original action, the motion has been denied and is no longer pending. Even if it were pending, however, it would not be properly removable since the motion is ancillary to the original action and the judgment rendered thereon. Barrow vs. Hunton, 99 U.S. 80 (1879). In addition, as regards the motion, the Ristuccias are

movants. Only defendants are entitled to remove an action under 28 U.S.C. §§ 1441 and 1443.

Moreover, the petition does not state a basis for diversity jurisdiction. A perusal of the complaint in the original action discloses that plaintiffs did not rely on any provision of federal law to support their cause of action. It is apparent that this case was never properly removable under 28 U.S.C. § 1441. See: Pullman Co. vs. Jenkins, 305 U.S. 534 (1938); Gully vs. First National Bank 299 U.S. 109 (1936).

It is equally apparent that there has never been a basis for removal under 28 U.S.C. § 1443. Section 1443 provides in pertinent part that a civil action may be removed by a defendant to the District Court where a State Court action is pending,

> " . . . against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States. . . ."

It is settled that only laws providing for specific civil rights designed to assure racial equality fall within the purview of the section. Thus, an action is removable under Section 1443 only in the rare situation where the operation of an explicit state or local law makes the denial of equal rights protected by federal statute clearly foreseeable. Georgia vs. Rachel, 384 U.S. 780 (1966); City of Greenwood vs. Peacock, 384 U.S. 808 (1966). The petition clearly reveals that Section 1443 was never applicable to this case.

Finally, the petition, assuming some basis for removability to exist, is woefully untimely. Section 1446(b) of Title 28 requires a petition to be made within

20 days after the receipt of the complaint or, if the case is not removable as stated in the complaint, within 20 days after receipt by defendant of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is removable. As the foregoing discussion makes plain, this case was not and never became removable. The denial of the Ristuccias' motion "to open judgment" could not operate to make it removable.

The petition is egregious in substance and tenor. The Court of Appeal in affirming the Superior Court's denial of the motion "to open judgment" observed:

> "It is not surprising that when appellants [the Ristuccias] discharged their attorneys and took matters in their own hands they proceeded to display their incapacity to represent themselves."

The language is equally apropos with respect to the Ristuccias' petition for removal.

Apparently, the Ristuccias seek to relitigate the original action or to have this Court review the denial of their motion "to open judgment". The Court can do neither. Even assuming a basis for federal jurisdiction existed, the doctrine of res judicata would bar the relitigation of the original State Court action. As to a review of the denial of their motion, it goes without saying that Federal District Courts have no appellate jurisdiction over State Court cases.

The Ristuccias have chosen to proceed without counsel. It is quite obvious that they have not the slightest understanding of federal removal jurisdiction. Their petition for removal is totally devoid of merit and it has resulted in a waste of the Court's time and effort. To allow the matter to proceed further would constitute a

needless imposition on the opposing parties.

Where federal jurisdiction is lacking under the removal statutes, the Court may act on its own motion to remand the case back to State Court. Since it appars that no action was pending in the State Court at the time of removal, it is questionable whether there is anything to remand. Nevertheless, the Court deems it proper to remand this case and dismiss the petition.

NOW THEREFORE IT IS ORDERED that Earl Adams and Bernice Adams vs. Frank R. Ristuccia, Lucille Ristuccia, Does I through XX, Inclusive, No. 805,962, be remanded to the Superior Court of the State of California for the County of Los Angeles.

DATED: April 26, 1967

United States District Judge

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK and LUCILLE RISTUCCIA, *Appellants,* vs. EARL and BERNICE ADAMS, *Appellees.*	No. 22,022

[February 12, 1969]

Appeal from the United States District Court
for the Central District of California

Before: BARNES, ELY and HUFSTEDLER, Circuit Judges

PER CURIAM:

Appellants were state court defendants who successfully counterclaimed in that litigation which was concluded on September 11, 1963, when the Superior Court of the State of California in and for the County of Los Angeles entered judgment for them. Approximately one year later, appellants, acting in *propria persona,* moved to reopen the judgment and modify the award, alleging fraud and collusion by their attorneys and the opposing parties. This motion was denied on October 2, 1964, and appellants appealed. The California District Court of Appeal affirmed and appellants were ordered to pay $200.00 in damages for bringing a frivolous appeal. When petition to the California Supreme Court proved unsuccessful, appellants filed a petition for removal to federal court under 28 U.S.C. §§ 1441 and 1443. The United States District Court for the Central District of California dismissed the petition and appellants challenge that decision in this court.

Any one of several reasons would be sufficient to bar appellants' removal petition. It would seem obvious that to remove an action to the federal courts from a state court, it must first be pending

in the state court. Since appellants' motion was dismissed by the state supreme court, appellants are actually attempting to obtain a federal forum by characterizing an appeal as a removal petition, an imaginative but unacceptable maneuver. Even assuming appellants to be the possessors of a cause of action pending in state court, other obstacles to removal are readily discernable. Appellants cannot allege either diversity of parties or a non-frivolous federal question. They therefore fail to meet the initial requirement of 28 U.S.C. § 1441, that the action be one which might have been filed originally in federal court. Further, appellants are not "defendants," another fundamental § 1441 prerequisite, since the original suit has long been terminated and they are the plaintiffs and initiators of the current action. *See, e.g., Gully v. First Nat. Bank*, 299 U.S. 109 (1936). Civil rights are in no way involved in appellants' action. Therefore, appellants' reliance on 28 U.S.C. § 1443 is misplaced. *See, City of Greenwood v. Peacock*, 384 U.S. 808 (1966).

After holding that appellants' removal petition was without merit, the district court, acting on its own motion, remanded the case to the state court, stating that because appellants lacked a pending state action, remand was "questionable." We think it not only questionable, but impossible. We hold that, as a matter of logic, if appellants had not existing cause of action to remove, the fact that the district court has determined that appellants lacked a removable cause of action creates no cause of action that can be remanded.

With their appeal, appellants have filed a complaint for declaratory relief and injunction which is directed against the parties who originally brought suit against appellants and all courts in which appellants have appeared. The complaint reargues the merits of appellants' case. We reject this complaint for the same reasons we affirm the dismissal of appellants' action for removal.

We AFFIRM the district court's dismissal of appellants' attempt to gain a federal forum under 28 U.S.C. §§ 1441 and 1443 and we REVERSE the district court's decision to remand appellants' claim to the state court. Treating appellants' "Complaint for Declaratory Relief and Injunction" as an application for a writ of mandamus, we deny and dismiss it.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 2-12-69—305

CERTIFICATE OF SERVICE BY MAIL

We FRANK AND LUCILLE RISTUCCIA certify under penalty of perjury that we mailed on May 12, 1969, "APPELLANTS' JURISDICTIONAL STATEMENT" to CHARLES PRICE, attorney for EARL AND BERNICE ADAMS, the appellees in this action, addressed to 6380 Wilshire Blvd, Suite 1415, Los Angeles, California.

Frank Ristuccia

FRANK RISTUCCIA
LUCILLE RISTUCCIA
1216 N. La Brea Avenue
Hollywood, California 90038

Appellants in pro per